



August 26, 1999

Mr. Edward W. Dunbar
Dunbar, Crowley & Hegeman, L.L.P.
4726 Transmountain Drive
El Paso, Texas 79924

OR99-2410

Dear Mr. Dunbar:

You have asked whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 126834.

The El Paso County Community College District (the "district"), which you represent, received two requests for information concerning certain named police officers and an investigation report concerning the district's police department. You explain that you have released much of the requested information. You contend, however, that portions of the submitted information at issue are protected from disclosure under sections 552.101, 552.102, 552.114, and 552.117 of the Government Code.¹

You first argue that certain information, which you have highlighted, is protected by a right of privacy. The test to determine whether information is private and excepted from disclosure under common-law privacy provisions, which are encompassed in section 552.101 and section 552.102 of the Government Code, is whether the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977); *Hubert v. Harte-Hanks Texas Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.-Austin 1983, writ ref'd n.r.e.). Much of the information at issue relates to work behavior of public servants. There is a legitimate public interest in how a public servant conducts himself while on-duty and how he performs his job functions. Open Records

¹You also raised as applicable exceptions sections 552.103, 552.107, and 552.108 of the Government Code, but none of the submitted information was marked as being protected by these exceptions and you provided no arguments under these exceptions. Thus, you may not withhold any of the requested information based on these exceptions to disclosure.

Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees); 423 at 2 (1984) (scope of public employee privacy is narrow). We have, however, marked portions of the records, including the photographs, that are protected from disclosure to protect common-law privacy interests of certain individuals.

You also argue that responsive tape recordings should be protected from disclosure based on privacy. You have not, however, submitted this information for our review. This ruling, therefore, cannot address whether this information may be withheld based on a right of privacy. Privacy determinations must be made on a case-by case basis. *See, e.g.*, Open Records Decision Nos. 600 (1992), 343 (1982) (a governmental body is required to make the initial determination regarding privacy), 328 (1982), 258 (1980). Assuming that there is information on the tapes protected by a right of privacy, we believe that if the tapes can be edited to successfully remove the protected portions, remaining portions must be released. If the tapes cannot be so redacted, you must withhold them in their entirety.

You next assert that some of the requested information you have highlighted is excepted from disclosure because it contains education records made confidential by the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, or section 552.114 of the Government Code. In Open Records Decision No. 634 (1995), this office concluded: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

We note that this ruling applies only to "education records" under FERPA. "Education records" are records that

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A). *See also* Open Records Decision Nos. 462 (1987), 447 (1986). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open

Records Decision Nos. 332 (1982), 206 (1978).² We agree that most of the information you have marked must be withheld under FERPA. We have marked the information that must be withheld. If you have further questions as to the applicability of FERPA to information that is the subject of an open records request, you may consult with the United States Department of Education's Family Policy Compliance Office. *See* Open Records Decision No. 634 (1995) at 4, n.6, 8.

You contend that some of the information at issue is protected under section 552.117 of the Government Code. Section 552.117 provides that information is excepted from disclosure if it relates to a peace officer's home address, home telephone number, social security number, or reveals whether the peace officer has family members. *See* Open Records Decision No. 622 (section 552.117 excepts from disclosure former home addresses and former home telephone numbers). We agree that section 552.117 is applicable to some of the highlighted information and have marked additional information that is protected under section 552.117.

We further note that some of the requested material may include the home address, phone number, social security number and family information of a current or former district employee who is not a peace officer. It is possible that this information may be confidential under section 552.117 of the Government Code, and therefore, this specific information, depending on the specific circumstances, may not be released. Section 552.117 of the Government Code excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or information revealing whether a public employee has family members of public employees who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold the home telephone number or social security number of a current or former employee or official who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989).

Additionally, section 552.130 of the Government Code provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

²*But see* 20 U.S.C. § 1232g(a)(1)(A), (d) (parent or adult student has affirmative right of access to that student's education records). *See also* Open Records Decision No. 431 (1985) (Public Information Act's exceptions to required public disclosure do not authorize withholding of "education records" from adult student).

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

* * * *

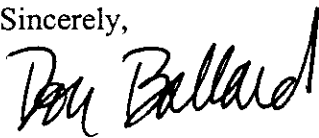
(b) Information described by Subsection (a) may be released only if, and in the manner, authorized by Chapter 730, Transportation Code.

We have marked information which you must withhold pursuant to section 552.130.

Finally, other social security numbers in the records may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Public Information Act on the basis of that federal provision. We caution, however, that section 552.353 of the Open Records Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink that reads "Don Ballard". The signature is written in a cursive, slightly slanted style.

Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 126834

Encl. Marked documents

cc: Mr. Eric Pearson
KTSM TV
Newschannel 9
801 North Oregon
El Paso, Texas 79902
(w/o enclosures)

Mr. David Croosler
El Paso Times
P.O. Box 20
El Paso, Texas 79901-1470
(w/o enclosures)